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The Applicability of the Consumer Protection Act 2008 to Credit Agreements

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1 Introduction

Here we will analyse the Consumer Protection Act of 68 of 2008 (CPA) to see which of its provisions govern transactions that fall within the National Credit Act 34 of 2005 (NCA). We will do so by examining s 5(2)(d) of the CPA, which excludes transactions that constitute credit agreements from the ambit of the CPA, and then by considering which provisions of the CPA this exclusion would affect.

2 Background

The CPA, assented to by the State President on 24 April 2009, seeks to consolidate consumer law in South Africa. Although it goes some way to doing so, having replaced five pre-existing statutes in their entirety and repealed provisions of a sixth, it has also had to accommodate various other pieces of legislation still applicable. It is therefore not the overarching framework for consumer protection that it was originally intended to be in the Draft Green Paper on the Consumer Policy Framework (Government Notice 1957 in *Government Gazette* 26774 of 9 September 2004).

The most significant of the current statutes that have to be accommodated are the NCA (s 5(2)(d)), the Long-term Insurance Act 52 of 1998, the Short-term Insurance Act 53 of 1998, and the Financial Advisory and Intermediary Services Act 37 of 2002 (definition of 'service' given in s 1). These statutes continue to govern services performed in terms of them. The insurance industry has been exempted from the CPA on condition that the Long-term Insurance Act and the Short-term Insurance Act are amended to ensure that consumers receive the same level of protection under those statutes as they will enjoy under the CPA (s 10, Schedule 2). There was much vacillation over whether the CPA would also apply to the NCA in respect of matters falling within the ambit of both, or apply only to transactions not covered by the NCA. In broad terms, the NCA covers every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic (s 4(1)). The banking sector spearheaded a lobby group by that opposed what it saw as a duplication of regulation (and the concomitant duplication of expenditure) that would arise if both statutes applied simultaneously (Bridget King 'Banks Can Breathe A Sigh of Relief',

available at http://www.deneystreitz.co.za/index.php/news/banks_can_breathe_a_sigh_of_relief/ (last visited on 26 May 2009)).

An early version of the Consumer Protection Bill excluded from its ambit matters that fell under the NCA. By the time the Department of Trade and Industry presented the Bill to stakeholders in March 2009, though, this position had been reversed and, had the Bill been enacted in that form, it would have applied also to credit agreements. The difficulty that the drafters of the Bill faced was that if they were to exclude credit agreements from the ambit of the CPA, consumers who bought goods on credit would not enjoy the same protection as those who paid cash. For example, the imposition of strict liability on suppliers for damages suffered by consumers as a result of defects in products sold to them by the suppliers would not have applied to products sold under credit agreements. A last-minute amendment resulted in the new s 5(2)(d) of the CPA considered in par 3 below.

3 The Interpretation of Section 5(2)(d) of the Consumer Protection Act

Section 5(2)(d) reads as follows:

‘This Act does not apply to any transaction –

- ...
(d) that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act;’

On the face of it, there seems no difficulty in arriving at the answer as to which of the CPA provisions apply to transactions falling under the NCA. But as we will now show, on a closer consideration the issue is not so straightforward.

The definition of ‘transaction’ given in s 1 of the CPA indicates three discrete aspects:

- the agreement between the parties for the supply of the goods and services;
- the actual supply of the goods;
- the performance of the services.

The first of these is defined as ‘an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them’. This definition is identical to that given for ‘agreement’ in the NCA. The second aspect, ‘supply’, is used in the section in the sense of the sale, renting, exchange and hire of goods or the sale or performance of services or the granting of access to any premises, event, activity or facility. It should be pointed out that the promotion of goods and services, a core element of what the Act covers in s 5(1)(b), is not included in the CPA definition of a transaction. The term ‘promote’ encompasses activities ranging from advertising, displaying and offering to supply goods and services to making representations regarding a willingness to supply

goods and services. As will be seen, this implied exclusion considerably broadens the extent to which the CPA also applies to NCA transactions.

We will argue that the CPA provisions can be classified into four categories:

- provisions that do not apply to credit agreements;
- provisions that do apply to goods and services that are the subject of credit agreements;
- promotional activities;
- provisions not relating to credit agreements.

We will now consider the first of these categories.

3 Provisions of the Consumer Protection Act That Do Not Apply to Credit Agreements

To identify those CPA provisions that do not apply to transactions falling within the NCA, one must start by deciding whether a provision relates to the transaction itself or to the goods and services supplied in terms of it. The NCA applies to the former, and the CPA applies to the latter. This might not be the case if the sale and the granting of credit were dealt with in two separate agreements, as is sometimes the practice. Then the NCA would apply to the credit transaction, and the CPA could notionally apply to the sale agreement and the goods and services. If both the sale and the credit transaction were contained in the same document, ch 5 (Consumer Credit Agreements) of the NCA would apply to the transaction.

The CPA provisions relating to the agreement are not as conveniently grouped together as in the NCA. The CPA sections that relate to the agreement and that arguably would not apply to a NCA transaction appear in the table below.

Section No.	Subject Matter
14	Expiry and renewal of fixed-term agreements
15	Preauthorisation of repair or maintenance services
16	Consumer's right to cooling-off period after direct marketing
17	Consumer's right to cancel advance reservation, booking or order
22	Right to information in plain and understandable language (to the extent that it applies to the contract)
26	Sales records
39	Agreements with persons lacking legal capacity
46	Changes, deferrals, and waivers and substitution of goods
48	Unfair, unreasonable or unjust contract terms

49	Notice required for certain terms and conditions
50	Written consumer agreements
51	Prohibited transactions, agreements, terms or conditions
52	Powers of court to ensure fair and just conduct, terms and conditions

Table I: Provisions of the CPA That Do Not Apply to Credit Agreements

It appears that the matters listed above relate to agreements and would thus not apply to transactions under the NCA, although this is not expressly stated to be the case in the CPA.

Next we will consider those CPA provisions that apply to the goods and services that are the subject of credit agreements.

4 Provisions of the Consumer Protection Act That Apply to Goods and Services That Are the Subject of Credit Agreements

The sections that relate most directly to the goods and services themselves are ss 54 and 55. Section 54 creates a consumer's rights to demand quality service, quality goods associated with the performance of the service, and the right to receive property back in the same state as it was when the supplier received it. Section 55 gives a consumer the right to receive goods that are reasonably fit for their intended purpose, of good quality and free of defects.

Section 56 is more problematic, because subs (1) relates to an implied warranty of quality in any transaction or agreement that pertains to goods. It would not, in terms of s 5(2)(d), apply if the sale of the goods were governed by a credit agreement. Sections 56(2) and 56(3), which relate to the customer's right to return unsatisfactory goods and the repair of defective goods respectively, do pertain to the goods rather than the agreement. Arguably they should apply even if there is an associated credit agreement.

The warranty on repaired goods created by s 57 is not linked expressly in the section to a credit agreement. There seems therefore to be no reason why it would not apply even to goods purchased under a credit agreement, although this would be inconsistent with the position regarding the implied warranty of quality imposed by s 56(1). But s 57 might not apply if the repair or maintenance work were financed by means of a credit agreement.

We suggest that the requirements of s 58 regarding the warnings that must be given in respect of unusual or not self-evident risks and of hazardous goods would apply even if they pertained to goods or services under a credit agreement. If this were not so, it would lead to an absurdity. The same is true of s 59, which relates to the recovery and safe disposal of designated products; s 60, which relates to the safe monitoring and recall of defective goods; and s 61, which creates strict liability on the part of producers, importers, distributors or retailers of goods for any harm caused by the goods.

Part C of ch 2 of the CPA contains a set of consumer rights that would apply to goods and services provided in terms of a credit agreement, because they do not relate to the agreement itself but are closely related to the goods or services. These rights are the consumer's right:

- to choose or examine goods (s 18);
- with respect to delivery of goods or supply of service (s 19); and
- to return goods (s 20).

The same argument would apply to the following further provisions in part I of ch 2 of the CPA:

- the supplier to hold and account for the consumer's property (s 65);
- deposits in respect of containers, pallets or similar objects (s 66); and
- return of parts and materials (s 67).

Finally, s 44, which relates to a consumer's right to assume that a supplier is entitled to sell goods, is also closely associated with the goods and should accordingly apply also to credit agreements. Now we will consider the position concerning promotional activities.

5 Promotional Activities

The provisions on promotional activity make up the bulk of the provisions of the CPA. Although these activities are not defined as goods or services, arguably they are still covered by the CPA. The basis of this contention is, first, that they are not, as was noted above, included in the definition of 'transaction' under the NCA (and so they are not specifically excluded). Second, s 5(1)(b) of the CPA specifically makes the CPA applicable to the promotion of goods or services.

In any event, the CPA itself provides in s 2(1) that it must be interpreted in a manner that gives effect to the purposes set out in s 3. These purposes include promoting fair business practices and protecting consumers from improper trade practices and deceptive, misleading, unfair or fraudulent conduct (s 3(1)(c) and (d)). The CPA provisions on promotional activity fall squarely within this list of purposes. So the approach of applying them to NCA transactions finds support in s 2(1).

Section 2(9) of the CPA provides, in broad terms, that if there is an inconsistency between any provision of the CPA and another Act, the provisions of both Acts are to apply concurrently, to the extent possible, but that where it is not possible to apply both, the provision that extends the greater protection to a consumer prevails. This section is of little help in deciding whether the CPA provisions on promotional activity apply to NCA transactions, because the former are complementary to the latter and not inconsistent with them, as will be seen below.

The category 'promotional activities' includes the whole of part A of ch 2 of the NCA, which relates to the prohibition of discriminatory marketing (ss 8 and 9). There is also an antidiscrimination provision in the NCA, s 61(2), but

that relates to different grounds. The antidiscrimination provisions of both statutes are, in any event, detailed reiterations of s 9 of the Constitution of the Republic of South Africa, 1996, and ch 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Part B of ch 2 of the CPA (comprising ss 11 and 12) would also, on the reasoning set out earlier in this section of our analysis, apply to credit agreements. This part B relates to the restriction of unwanted direct marketing and the regulation of the time for contacting customers. Section 75 of the NCA similarly restricts certain marketing practices.

The unsolicited provision of goods and services (s 21 of the CPA) should be regarded as a promotional activity that would be covered by the CPA, as should the marketing activities covered by ss 29 to 36 and s 38 (referral selling), all grouped under the heading 'right to fair and responsible marketing'. Similarly, certain of the provisions headed 'right to fair and honest dealing' in part F of ch 2 relate to promotional activities:

- unconscionable conduct (s 40);
- false, misleading or deceptive representations (s 41);
- fraudulent schemes and offers (s 42);
- pyramid and related schemes (s 43); and
- over-selling and over-booking (s 47).

Now we will consider the CPA provisions that do not relate to credit agreements.

6 Provisions of the Consumer Protection Act Not Relating to Credit Agreements

There is a fourth category of provisions of the CPA: those that deal with matters that are unlikely to have a bearing on transactions governed by a credit agreement and that do not refer directly to the goods or services themselves. These provisions are listed in the table below.

Section No.	Subject Matter
35	Customer loyalty programmes
37	Alternative work schemes
45	Auctions
62	Lay-bys
63	Prepaid certificates
64	Prepaid services

Table II: Provisions of the CPA Not Relating to Credit Agreements

The provisions listed above would not apply to credit agreements, because they have no bearing on them.

7 Conclusion

Three main aspects must be emphasised. First, it is evident that s 5(2)(d) of the CPA lacks clarity in stating that the CPA does not apply to credit agreements under the NCA but only to the goods and services that are the subject of the agreement. Numerous sections of the CPA do not pertain directly to goods and services but to other matters, including marketing. This oversight could give rise to a number of absurdities.

A further difficulty is that, in some instances, there may be two separate agreements relating to the sale of the goods and the financing of the purchase respectively. As a result, the provisions of both the CPA and the NCA would apply.

Although the interpretation provisions of the CPA are of some help, it would have been preferable for Parliament to specify which CPA provisions do or do not apply to goods and services that are subject to a credit agreement. Alternatively, Parliament could have omitted s 5(2)(d) and specified in the intended sections themselves that they do not apply to agreements governed by the NCA. There is precedent for the latter approach in the CPA itself: eg, ss 16 and 17 state that they do not apply to a transaction covered by s 44 of the Electronic Communications and Transactions Act 25 of 2002 and to a franchise agreement respectively.

Without this clarification, the present uncertainties will lead to protracted litigation, unnecessary expense and much commercial inconvenience. They are also likely to lead to consumers being deprived of the very protection from which they were intended to benefit. So it is recommended that this lack of clarity be remedied by statutory intervention.
